against them. The other defendants had all entered their appearances on diverse dates. The present appellants entered theirs on April 4 and 10, 1984 respectively.

On April 17, 1984 upon a request by the defendants' solicitors, the respondents' solicitors supplied to the former copies of documents relating to the claim.

On May 31, 1984 the respondents took out a summons-in-chambers under Order 14 against the four defendants to sign a final judgment but the sum to be signed was a smaller sum *i.e.* $66,303.89. The reason for this reduction was fully explained by the respondents to be due to the fact that the value of vehicles repossessed in the meantime had to be taken into account.

The summons-in-chambers was heard by a Senior Assistant Registrar. Two objections were raised by the defendants. First, no summary judgment under 0.14 could be given when the amount claimed differed from the amount to be signed. Secondly, the respondents were not entitled to the summary judgment because they were guilty of delay in applying for it. The Senior Assistant Registrar accepted both the objections and hence dismissed the respondents' application.

On appeal to the High Court, V.C. George J. reversed the decision of the Senior Assistant Registrar.

Only two defendants appeal to us, namely defendant No. 3 and defendant No. 4.

We are of the view that there is no merit in this appeal and that it should be dismissed.

In the first place, as regards the objections to the difference between the amount claimed and the amount to be signed in the judgment, we wholly agree with the view expressed by George, J. in his grounds of decision in that the matter was fully explained by the respondents to the effect that credit had to be given for the value of cars which the respondents re-possessed between the date of the writ and the date of the summons-in-chambers. We do not see any need to amend the Statement of Claim for the making of this adjustment.

In the second place the law as to the time when an application for an Order 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no Order 14 judgment could be signed. This is the *ratio decidendi* in *McLardy* v. *Slateum.*[1] This case was followed by Raja Azlan Shah, J. (as he then was) in *Comptroller-General of Inland Revenue, Malaysia* v. *Weng Lok Mining Co. Ltd.*[2] and Abdoolcader, J. (as he then was) in *Societe des Etains de Bayas Tudjuh* v. *Woh Heng Mining Kongsi.*[3]

In the present appeal no defence was ever filed in by the appellants and other defendants. All that the respondents did before applying for the judgment was to await the next move to be made by the appellants and their co-defendants after appearances had been entered by them. We do not think that the delay in this case is such as to inhibit the court from granting the respondents' application for an Order 14 judgment.

We therefore dismiss the appeal with costs and direct that the deposit be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Ng Ek Teong & Partners; Skrine & Co.*

A.R. FERNANDEZ & ORS. v. NATIONAL UNION OF BANK EMPLOYEES

[S.C. (Seah, Syed Agil Barakbah & Wan Hamzah S.C.JJ.) May 2, 1985 & March 17, 1986]

[Kuala Lumpur – Federal Court Civil Appeal No. 325 of 1983]

Practice and Procedure – Trade Union – Application for interlocutory injunction – Arbitration – Whether High Court has power to make interim injunction – Whether party ready and willing to do things necessary for proper conduct of arbitration – Trade Union Act (Act 262), ss. 40, 44(1) & 46 – Arbitration Act (Act 93), ss. 6, 13(6) & 321.

Trade Union – Application for injunction – Arbitration – Trade Union Act (Act 262), ss. 40, 44 & 46.

The appellants in this case were at the material times members of the respondent Union. They received a letter from the respondent Union dated December 23, 1981 addressed to all officer-members of the Union by which they were informed that the Constitution and the Rules of the Union have been amended to provide that only clerical and non-clerical staff can be members of the Union and that those amendments had been registered with the Registrar of Trade Unions. The appellant brought an action against the respondent Union claiming –

(a) a declaration that their exclusion from the membership of the Union was *ultra vires*, illegal and void;

(b) an injunction to restrain the Union from continuing to enforce the exclusion or taking or continuing any steps with a view to effecting the exclusion;

(c) damages for breach of contract.

The respondent Union raised a preliminary objection that in view of section 44(1).of the Trade Unions Act and Rule 2 of the Constitution and Rules of the Union the dispute should be referred to arbitration. The High Court upheld the preliminary objection and ordered that the matter be referred to arbitration. The appellants appealed. The respondent Union cross-appealed on the ground that the learned Judge should had made an order dismissing the action.

Held: (1) even if the order for arbitration made by the High Court was a proper one, the High Court would still have power to deal with the motion for interlocutory injunction by virtue of section 13(6) (h) of the Arbitration Act;

(2) the amendments complained of in this case have been made by the Trade Union and registered by the Registrar of Trade Unions and therefore there is no *status quo* to preserve. The balance of convenience does not favour the grant of interlocutory injunction and damages, if any, would in this case be an adequate remedy. The motion for interlocutory injunction should therefore be dismissed;

(3) the respondent Union in this case has not complied with section 6 of the Arbitration Act, in that it has not stated in its affidavit that it was and is ready and willing to do all things necessary for the proper conduct of arbitration. The learned judge should not therefore have made an order for reference to arbitration;

(4) the appeal of the appellants is allowed and the order of the High Court for reference to arbitration is set aside. The cross-appeal of the respondents is dismissed.

Cases referred to:

(1) *Rimbunan Hijau Sdn. Bhd.* v. *Sarawak Plywood (M) Sdn. Bhd.* [1985] 2 M.L.J. 377.
(2) *R. & W. Paul Ltd.* v. *The Wheat Commission* [1937] A.C. 139.
(3) *Piercy* v. *Young* (1880) 14 Ch. D. 200.
(4) *Muthuraku* v. *Kuala Lumpur Municipality Workers Trade Union* [1973] 1 M.L.J. 206.
(5) *Re National Union of Commercial Workers* [1974] 1 M.L.J. 172.
(6) *Kolandaisamy* v. *Annamalai & The Harbour Trade Union* [1968] 1 M.L.J. 222.
(7) *Tharmalingam* v. *Sambanthan* [1961] M.L.J. 63.
(8) *Periasamy & Ors.* v. *National Union of Plantation Workers & Ors.* [1975] 2 M.L.J. 108.

SUPREME COURT.

T. Thomas for the appellants.

G. Vadiveloo (*D.P. Xavier* with him) for the respondents.

Cur. Adv. Vult.

Wan Hamzah S.C.J. (delivering the Judgment of the Court): The National Union of Bank Employees ("the Union") is a trade union registered under the Trade Unions Act. In 1964 the Union established the National Union of Bank Employees Benevolent Fund ("the Benevolent Fund"). Under Rule 4 of the Benevolent Fund Rules every member of the Union, whose subscriptions are not in arrears, shall automatically become a member of the Benevolent Fund. Rule 2A(1) of the Constitution and Rules of the Union provides as follows:

"The objects of the Union shall be to secure the complete organisation of members of the executive, clerical and non-clerical staffs of all commercial banks and their subsidiary finance companies in West Malaysia as may be approved by the National Executive Council."

Rule 3(1) of the Constitution and Rules of the Union provides, *inter alia*, as follows:

"Any member permanent or temporary of the executive, clerical and non-clerical staffs of any commercial bank in the Federation of Malaya who is above 16 years shall be eligible for membership ..."

The appellants (hereafter referred to as the plaintiffs) were at the material times members of the Union. The first plaintiff was a founder member of the Union. The second plaintiff became a member in 1961 and the third plaintiff in 1958. The first plaintiff is an Assistant Officer in the Chartered Bank and the Second and the third plaintiffs are Staff Officers in the Hongkong And Shanghai Banking Corporation. They received a letter from the Union dated December 23, 1981 addressed to all officer-members of the Union, by which they were informed that Rule 2A(1) and Rule 3(1) of the Constitution and Rules of the Union have been amended by deletion of the word "executive", the effect of which is that the Union can have only clerical and non-clerical staff within its membership and all officer-members ceased to be members of the Union with effect from December 8, 1981, and the Union would not collect subscriptions from them with effect from

that date. The plaintiffs were also informed that the Registrar of Trade Unions has registered the amendments.

The plaintiffs contend that the Union has no power to make such amendments to Rules 2A(1) and 3(1) and the amendments are *ultra vires* the Constitution and Rules of the Union and therefore null and void. They contend that even if the Union has power to make the amendments, they were made in contravention of section 40(1)(f) of the Trade Unions Act and Rule 25 of the Constitution and Rules of the Union in that they were made without secret ballot being taken to sanction the amendments. Section 40(1)(f) of the Trade Unions Act provides as follows:

"A trade union shall take a secret ballot to make a decision on any of the following matters –

(f) amendment of rules where such amendment results in increasing the liability of the members to contribute or in decreasing the benefits to which members are entitled."

Rule 25 of the Constitution and Rules of the Union provides as follows:

"A secret ballot is required on the following matters subject to the proviso laid down in Rule 3(1) herein:

(d) Amendment of Rules where such amendments result in increasing the liability of the members to contribute, or in decreasing the benefits to which members are entitled."

The plaintiffs further contend that the amendments were made in breach of the principle of natural justice in that the executive staff were not given an opportunity of being heard before the decision to terminate their membership was taken. Therefore they bring the action against the Union claiming:

(a) a declaration that their exclusion from the membership of the Union is *ultra vires*, illegal and void;

(b) an injunction to restrain the Union from continuing to enforce the exclusion or taking or continuing any steps with a view to effecting the exclusion;

(c) damages for breach of contract.

On filing the writ the plaintiffs also filed a notice of motion for interlocutory injunction to restrain the Union until judgment in the action from continuing to impose the purported exclusion. In the affidavit in support of the motion the first plaintiff stated, *inter alia*

"The consequences of the purported amendments are far-reaching... All the benefits of Union membership are wholly removed. One such benefit is ... under the Benevolent Fund ... the Benevolent Fund Rules only provide for the payment of benefits under the Fund in the event that a member retires (including resignation from bank employment) or if he dies. It does not cater for the situation that has occurred in the instant case. Accordingly all the members of the executive staff are now deprived of the benefits under the Benevolent Fund..."

The Union filed an affidavit in opposition to the motion. The following are some of the contentions of the Union:

(i) In 1978 the Union revised its Constitution and Rules. When it submitted the revision to the Registrar of Trade Unions, he required the deletion of the word "executive" from certain rules. The Union had no alternative but to comply with his requirement.

(ii) The continued membership of the executive staff is not in consonance with the Government's policy that workers in any trade, industry or occupation should be represented by proper unions. Failure to comply with the requirement of the Registrar would jeopardise and endanger the very existence of the Union itself. Under the Trade Unions Act the Registrar is empowered to cancel the registration of a trade union. He is also empowered to delete any group of members from the membership register of a trade union.

The above contentions of the plaintiffs and of the Union form the main issues in this case, and we shall refer to them as the main dispute.

In its affidavit in opposition to the motion the Union raised other contentions in addition to those stated above. Some of the other contentions are:

(a) The plaintiffs had allowed almost a year before filing the action, and therefore they are barred by laches and acquiescence.

(b) Even if there was merit in the motion, the balance of convenience does not favour a grant of interlocutory injunction.

(c) In view of section 44(1) of the Trade Unions Act and Rule 2 of the Constitution and Rules of the Union the main dispute is a dispute which should be referred to arbitration. There is in existence a panel of arbitrators appointed pursuant to Rule 26 which is ready and available to determine the main dispute. The plaintiffs have not exhausted the domestic remedies. Until the domestic remedies have been exhausted the High Court has no jurisdiction in the matter and no power to grant the order asked for in the plaintiffs' notice of motion.

Section 44(1) of the Trade Unions Act provides as follows:

"Every dispute between –

(a) a member or person claiming through a member or under the rules of a registered trade union or any branch thereof, and the union or any branch thereof or an officer thereof;

(b) any person aggrieved who has ceased to be a member of a registered trade union or any branch thereof, or any person claiming through such person aggrieved, and the union or any branch thereof, or an officer thereof;

(c) .....

(d) .....

(e) .....

shall be decided in the manner directed by the rules of the trade union, and the decision so given shall be binding and conclusive on all parties; and application for the enforcement thereof may be made to a Sessions Court."

Rule 26 of the Constitution and Rules of the Union reads as follows:

"1. Every dispute between:

(a) a member or person claiming through a member or under the Rules, on the one part, and the Union or any branch thereof or an officer thereof, on the other part; or

(b) any person aggrieved who has ceased to be a member of the Union or any person claiming through such person aggrieved, on the one part, and the Union or any branch thereof or an officer thereof, on the other part;

(c) .....

(d) .....

shall be decided by reference to arbitration.

2. .....

3. .....

4. In this rule the expression "dispute" includes any dispute arising on the question whether a member or person aggrieved is entitled to be or continue to be a member or to be reinstated as a member but, save as aforesaid, in the case of a person who has ceased to be member, does not include any dispute other than a dispute on a question between him and the Union or any officer thereof, which arose whilst he was a member or arises out of his previous relation as a member of the Union."

It is common ground that the Constitution and Rules of the Union form a contract between the Union and its members.

When the notice of motion came up for hearing counsel for the Union raised a preliminary objection on the basis of its contention (c) above. In reply to the preliminary objection the plaintiffs invoke section 6 of the Arbitration Act, which provides as follows:

"If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

It was contended that if the Union wanted the main dispute to be referred to arbitration it was incumbent upon it to apply for the stay of the court proceedings in accordance with section 6 and to support the application with an affidavit stating that it was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. Before the notice of motion came up for hearing the plaintiffs' solicitors had informed the Union's solicitors that they would bring up this contention at the hearing. The Union did not make such application. Nor did the Union file another affidavit in opposition to the plaintiffs' motion. In the only affidavit filed on its behalf nothing is stated about readiness and willingness to do all things necessary for the proper conduct of the arbitration. In reply to the preliminary objection it was also submitted that since the instant case involves difficult question of law and alleged breaches of the rules of natural justice, it is not a fit and proper case to be referred under the domestic grievance procedure, but the High Court is the best forum for adjudication.

On behalf of the Union it was argued that the Arbitration Act does not apply to disputes which are governed by the Trade Unions Act, because the Trade Unions Act not only makes it mandatory for disputes as defined by sections 44(1) and 46 to be disposed of by arbitration but also requires that provisions be made in the rules of every trade union for the manner in which such disputes shall be decided, vide section 38 and the First Schedule paragraph 11. The High Court upheld the preliminary objection and ordered that "the matter be referred to arbitration in accordance with the Trade Unions Act" and also ordered costs against the plaintiffs. There were no other orders. In his judgment the learned Judge did not deal with the motion for interlocutory injunction on its merits. Probably he was of the opinion that he has no jurisdiction to do so in view of the provisions for arbitration. Indeed the learned counsel for the Union submitted so before us. The plaintiffs now appeal against the judgment. There is also cross-appeal by the Union on the ground that the learned Judge should have made an order dismissing the action.

We do not find anything in this case which should prevent the High Court from exercising its usual jurisdiction to adjudicate on an application for interlocutory injunction on its merits. In our judgment the High Court has full power to consider and decide on the plaintiffs' motion for interlocutory injunction in this case. Later in this judgment we shall show that the order of reference to arbitration made by the High Court is not a proper order; but even if it had been a proper one the High Court would still have the power to deal with the motion for interlocutory injunction by virtue of section 13(6)(h) of the Arbitration Act, which provides –

"The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of – interim injunctions ... as it has for the purpose of and in relation to an action or matter in the High Court."

Later in this judgment we shall show that the Arbitration Act is applicable in this case. In our judgment the High Court should have proceeded to consider and decide on the motion for interlocutory injunction on its merits. In order to consider whether the motion should be granted all the relevant matters have to be taken into consideration, in particular whether on the balance of convenience *status quo* should be maintained and whether damages would be adequate remedy for the Plaintiffs: *Rimbunan Hijau Sdn. Bhd.* v. *Sarawak Plywood (M) Sdn. Bhd.*[1] In our opinion the disposal of the motion would be delayed if we were to send it back to the High Court for its decision, and since all the necessary materials are before us we feel that we should proceed to consider the merits of the motion ourselves. Applying the principles stated above we examine and find that the amendments complained of have been made by the Union and registered by the Registrar and therefore in this respect there is no *status quo* to be preserved. We arrive at the view that balance of convenience does not favour the grant of interlocutory injunction and that damages, if any, should be adequate remedy for the plaintiffs. Therefore in our opinion the motion should be dismissed, and we order accordingly.

On the question whether the main dispute should be referred to arbitration our view is that the Arbitration Act applies in this. We are fortified in our view by the judgment in the case of *R.&W. Paul Limited* v. *The Wheat Commission.*[2] The facts in that case were as follows:

By section 5 of the Wheat Act 1932 the Wheat Commission were empowered to make by-laws for giving effect to the provisions of the Act and the by-laws should in particular provide for the final determination by arbitration of disputes arising as to such matters as might be specified in the by-laws. Purporting to act under this section the Wheat Commission made a by-law, numbered 20, providing that any dispute arising between the Wheat Commission and any other persons as to whether any substance was flour should be referred to arbitration as therein provided and the decision of the referee as to the matter in dispute shall be final and conclusive, and that the Arbitration Act 1889 shall not apply in relation to any reference under that by-law. A dispute arose as to whether certain middlings were flour within the meaning of the Act. Arbitration proceedings were taken and the referee made a finding that the middlings were flour for the purpose of the Act.

It was held by the House of Lords that the middlings were not flour within the meaning of the Wheat Act 1932, and that by-law 20 purporting to exclude the operation of the Arbitration Act 1889 from any arbitration under the Wheat Act 1932, was *ultra vires* and invalid. Per Lord Macmillan:

"The Arbitration Act is a statute of general application and it confers a valuable and important right of resort to the Courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute provides for the reference of disputes to arbitration it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitrations, with all the attendant rights which the general law confers. I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of arbitrations. Rather the contrary. If this is intended, express words to that effect are in my opinion essential, and there are here no such express words."

In our view a similar situation obtains in the present case. Neither has the Trade Unions Act excluded the operation of the Arbitration Act by express provisions, nor has it done so by implication. On the contrary the Arbitration Act itself provides as follows in section 32:

"(1) This Act, except the provisions thereof specified in subsection (2), shall apply to every arbitration under any other written law (whether passed before or after the commencement of this Act), as if the arbitration were pursuant to an arbitration agreement and as if that other written law were an arbitration agreement, except so far as this Act is inconsistent with that other written law or with any rules or procedure authorized or recognised thereby.

(2) The provisions referred to in subsection (1) are sections 4(1), 5, 7, 19(3), 25, 26 and 28."

It is clear from subsection (1) of section 32 that the provisions of the Arbitration Act which do not apply in this case [apart from those mentioned in

subsection (2)] are the provisions which are inconsistent with the Trade Unions Act or with Rule 26 of the Constitution and Rules of the Union. We find nothing in section 6 of the Arbitration Act which is so inconsistent. Therefore in our view section 6 applies in this case, and in our judgment the Union must comply with the section before the main dispute can be referred to arbitration. On the question whether the Union has complied with the section, we would like to refer to the case of *Piercy* v. *Young*.[3] The main questions at issue in that case were whether the shares in a certain partnership of which the plaintiff was a partner were purchased on behalf of the plaintiff and the defendant or of the defendant alone, and whether the defendant had purchased the shares of the plaintiff as well as of the other partners. The defendant moved for an order under the Common Law Procedure Act, section 11, staying all proceedings in the action, and referring the matters in question to arbitration. When that case came up before the Court of Appeal the question was raised whether the Court ought to have been satisfied that the defendant was ready to refer to arbitration at the time the action was commenced. On this question Jessel M.R. gave the ruling of the Court of Appeal stating, *inter alia*, as follows:

> "..... I think it is right to say that the Court should have required an affidavit to be produced of readiness and willingness to refer to arbitration at the time when the motion was heard in the Court below .... the Court is required to be satisfied under the section, and therefore of course the Court must see that there is some evidence in support of the affirmative proposition. In this case there was none, and there was some little evidence of a disinclination to refer to any domestic tribunal....."

It has been shown above that the Union has not complied with section 6, in that it has not stated in affidavit that it was and is ready and willing to do all things necessary for the proper conduct of arbitration. Therefore we are of the view that the learned Judge should not have made an order for reference to arbitration.

Five Malaysian cases were cited in support of the Union's case. We would like to deal briefly with each of those cases:

Muthuraku v. *Kuala Lumpur Municipality Workers Trade Union*[4]:

There was a dispute as to whether an emergency general meeting of the trade union had power to decide matters pertaining to the election of officers of the trade union. It was held by the Federal Court that since the President of the trade union could not refer the dispute to arbitration as provided in the Rules of the trade union because there was no panel of arbitrators appointed, the alternative left open for the dispute to be determined was for the parties by mutual consent to refer it to the Registrar of the Trade Unions pursuant to Rule 26, but since there was no mutual consent for reference to the Registrar the President was no longer compellable to resort to domestic forum, and it must follow as a matter of course that he had to seek redress in the court. We do not see how the decision can be of any help to the Union in the present case. On the other hand we find that it lends support to the plaintiffs' case in so far as it was decided that if for some valid reason it was not possible to refer a dispute to arbitration the proper forum for redress is the court.

Re National Union of Commercial Workers[5]:

Certain members of the union applied for a declaration that the respondents (the Executive Council) had acted *ultra vires* the rules of the union in passing a resolution postponing the biennial delegates conference beyond a certain date. On a preliminary objection the High Court found that there was provision in the Rules of the union that every dispute between a member and the union should be decided by reference to arbitration, and held that the applicants should exhaust all domestic remedies before taking the dispute to the court, and dismissed the application. We find nothing in the report to show that question of non-compliance with section 6 of the Arbitration Act was raised in that case as it was done in the present case.

Kolandaisamy v. *Annamalai & The Harbour Trade Union*[6]:

In an action in the High Court the plaintiff claiming that he was a member of the union, sought a declaration that the election of the members of the executive council of the union was null and void, and an injunction to restrain the executive council and every member thereof from acting in such capacity. On a preliminary point it was held by the High Court that the rules of the union provided that any dispute between a member and the union should be decided by reference to arbitration and that the dispute in that action was such a dispute. It was further held that the court had no jurisdiction to hear and

adjudicate upon the action, and the action was dismissed. The report does not show that in that case question of non-compliance with section 6 of the Arbitration Act was raised, unlike the position in the present case. It appears that the injunction sought in that case was not an interim one as in the present case. Therefore section 13(6)(h) of the Arbitration Act had no application in that case.

Tharmalingam v. *Sambanthan*[7]:

The Constitution of the Malaysian Indian Congress provided for appeal by a suspended member to the Working Committee. The appellant in that case brought an action in the High Court asking for a declaration that his suspension from membership was null and void. On appeal against the decision of the High Court it was held by the Court of Appeal that it was a condition precedent that the appellant should resort to the domestic remedies provided (*i.e.* appeal to the Working Committee), before resorting to the courts. The question of arbitration was never an issue in that case. Therefore in our opinion the decision in that case has no application in the present case before us.

Periasamy & Ors. v. *National Union of Plantation Workers & Ors.*[8]:

The applicants, who were members of the union, by notice of motion asked for an injunction to restrain the second and the third defendants from taking, holding or remaining in office as executive council members on the ground that there was illegality in their election to the office. At the hearing of the notice of motion preliminary objection was raised on the ground that the applicants had not exhausted all domestic remedies and the court had no jurisdiction to decide on the dispute. The High Court found that under the rules of the union when there is a dispute connected with election of officers of the union or with non-compliance with any rule of the union the parties to the dispute may, by consent, refer the dispute to the Registrar of Trade Unions. The High Court also found that the applicants had not applied their minds to the question of reference to the Registrar of Trade Unions. The High Court further found that the applicants had not acted *bona fide* in view of the delay for two and a half years in bringing the action. The motion was dismissed. We are of the opinion that *Periasamy's* case was not a case of arbitration to which the Arbitration Act applied. Therefore it is distinguishable from the present case.

The plaintiffs' appeal is allowed with costs here and in the court below. The order of the High Court for reference to arbitration is set aside. The Union's cross-appeal is dismissed with costs. The deposit should be paid to the plaintiffs.

Appeal allowed;
Cross-appeal dismissed.

Solicitors: *Skrine & Co.; D.P. Xavier & Co.*

NAHAR SINGH v. PANG HON CHIN

[A.C.J. (Edgar Joseph Jr. J.) May 28 & June 2, 1983]

[Penang – Perak Civil Appeal No. 44 of 1982]

Fraud – Onus of proof – Higher standard of proof than that which is required in ordinary matters.

Contract – Sale and Purchase agreement – Deposit allegedly paid by appellant under agreement for purchase of house – Claim for return of deposit against respondent – Respondent alleging fraud against appellant – Onus of proof on respondent.

Evidence – Hearsay – Passport with endorsements to show respondent's absence from country during relevant time – Endorsements not proved by calling their author – Inadmissible.

In the court below, the appellant sued the respondent for the return of a sum of $6,000 which he claimed he had paid the respondent as a deposit under a Sale and Purchase Agreement dated January 3, 1979 for the purchase of a terrace house.

By his defence, the respondent denied both the execution of the agreement and the receipt of the deposit. He contended that he was absent from Malaysia from November 17, 1978 to January 22, 1979 and could not have entered into transaction with the appellant on January 3, 1979. He however, admitted that he had sold the property to one Mr. Chung.

At the trial it became clear that what was alleged was not fraud on the part of the appellant but fraud on the part of an unknown third party who had impersonated the respondent and entered into the transaction concerned with the appellant.

Held, allowing the appellant's claim: (1) once *prima facie* evidence was adduced by the appellant that it was the respondent who executed the agreement and received the deposit of $6,000 the onus shifted to the respondent to prove his allegation of impersonation. The respondent had failed to discharge this onus;

(2) where fraud in the form of a criminal offence is alleged, even in civil proceedings, a higher standard of proof than that in ordinary matters is required,